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Supreme Court, U.S.
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No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

MARK ROLLINSON and EDMUND S. BARNETT,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether acknowledgment by a debtor resets the federal statute of limitations for guarantors of the debt?

LIST OF PARTIES

The parties to this proceeding are: Plaintiff-Appellee, United States of America as Respondent; and Defendant-Appellants Edmund Barnett and Mark Rollinson as Petitioners.

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TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

Petitioners Mark Rollinson and Edmund S. Barnett pray a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit and to bridge the interstices in the general federal statute of limitations.

OPINIONS BELOW

Review is sought of the published opinion of the United States Court of Appeals for the District of Columbia Circuit, *United States v. Rollinson,* 866 F.2d 1463 (1989) reprinted herein at Appendix A, affirming the published opinion of the United States District Court for the District of Columbia, *United States v.*

Rollinson, 629 F.Supp. 581 (1986) reprinted herein at Appendix B.

JURISDICTIONAL GROUNDS

The opinion of the District of Columbia Circuit Court of Appeals was rendered February 3, 1989 and rehearing was denied April 17, 1989. This petition for a writ of certiorari was filed within ninety days of the denial of rehearing.

Jurisdiction of this Court is predicated on Title 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 2415(a)(1978)(originally enacted July 18, 1966) provides:

> ...[E]xcept as otherwise provided by Congress, every action for money damages brought by the United States ...founded upon any contract ...shall be barred unless the complaint is filed within six years after the right of action accrues... *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment...

D.C. Code Ann. § 28-3504 (1981)(originally enacted 1901, re-enacted by Congress August 30, 1964) provides:

> In an action upon a simple contract, an acknowledgment or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof, unless the acknowledgment or promise is in writing, signed by the party chargeable thereby.

STATEMENT OF THE CASE

On October 16, 1973 Sounds Reasonable, Inc. (hereinafter "debtor" or "SRI") borrowed $120,000 from the District of Columbia National Bank (hereinafter "Bank") by making a seven year note requiring equal monthly installments of interest and

principal of $2055. Respondent, the Small Business Administration (hereinafter "SBA"), guarantied the note. Petitioners Mark Rollinson and Edmund S. Barnett and three other individuals also guarantied the note by signing SBA guaranty agreements[1] reprinted herein at Appendix C. Importantly, the guaranty agreements gave no authority to the debtor or SBA to act for the petitioners and made the petitioners' liability independent of the debtor's liability.

Within a few months debtor was in default of the note placing the petitioners independently in default of their guaranty agreements. SBA policy under 13 C.F.R. § 120.203 (1988) required prompt payment and the petitioners expected that upon default by the debtor demand would follow promptly. Instead, the debtor and the Bank negotiated many deferrals of note payments whereby the Bank profited from interest while essentially no further principal payments were made on the note. Even with deferrals, default was the norm.

On both April 1, 1977 and December 22, 1977 the Bank notified the petitioners that demand would be made if the debtor remained in default for ten more days. Ten days came and went while the debtor remained in default, however no demand was made on petitioners.

On March 30, 1978, four years after default, the Bank made demand on the guarantor SBA and on April 11, 1978 SBA paid off the Bank and accepted assignment of the note and guaranty agreements.

On February 5, 1979 the debtor and the SBA negotiated a modification agreement, reprinted herein at Appendix D, which would forgive years of default, grant more deferrals, lower payment terms, and extend maturity on the note nine years. Significantly, the debtor and the SBA sought petitioners' consent to and signatures on the modification agreement which contained a signature block for petitioners, however petitioners refused to consent or sign the agreement. Neither the debtor nor the SBA

[1]Of the three other individual guarantors, over the course of the decade spanning default to filing suit one guarantor went bankrupt, one settled, and one disappeared or is dead.

signed the modification agreement on behalf of petitioners, whose signature block remained empty. The debtor never complied with the modification agreement.

On October 25, 1979, over six years after default, at long last demand under the guaranty agreements was made on petitioners by SBA. On November 6, 1984 the SBA filed this action under 28 U.S.C. § 1345 against petitioners based on the assigned guaranty agreements.

On the SBA's motion for summary judgment, United States District Court Judge Joyce Green found the federal statute of limitations accrued when the government made demand on the guarantors, but only if demand was made within a reasonable time after default based on the parties' expectations. The District Court avoided the jury issue of whether the Bank prior to assignment or the government thereafter unreasonably delayed demand. Ignoring the previous six years of default, SBA's prompt payment policy, petitioners' expectations, and the guaranties' independent liability, the District Court measured timeliness of demand only from one date, that of "SRI's final default" under the modification agreement, and deemed it reasonable. The District Court entered judgment against petitioners for $99,077.20 of principal and $54,633.25 of accrued interest.

On appeal the United States Court of Appeals of the District of Columbia Circuit decided not to decide whether the District Court erred in determining for itself the reasonableness of the delay in demand. Instead, Circuit Judge David B. Sentelle, writing for the Court, advanced a new theory of acknowledgment, stating:

> Absent evidence that the guarantors' consent was required to modify the note, and given the guaranties' broad vesting of power to the holder to modify or extend the loan, we hold the 1979 modification agreement effectively renewed the statute of limitations against the guarantors.

On petition for rehearing, petitioners charged that Judge Sentelle's new theory conflicted with D.C. Code Ann. § 28-3504 (1981), the statute of frauds enacted by Congress in 1964, which should have prevented renewal of the petitioners' statute of limita-

tions in this case. The Court of Appeals denied rehearing on the new theory.

REASONS FOR GRANTING THE WRIT

"Few areas of the law stand in greater need of firmly defined easily applied rules than does the subject of periods of limitations." *Wilson v. Garcia,* 471 U.S. 261, 266 (1985)(STEVENS, J.) *quoting Chardon v. Fumero Soto,* 462 U.S. 650, 667 (1983) (REHNQUIST, J., dissenting). The District of Columbia Circuit Court of Appeals' decision muddles a basic federal statute of limitations question: who may renew the statutory limitations period by acknowledgment.

By refusing to adopt the statute of frauds, the Circuit Court decision in this action conflicts with federal law, with the intent of Congress, and with the decisions of this Court in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) and *United States v. Yazell,* 382 U.S. 341 (1966). The conflict precipitates a quagmire in federal law confusing not only the hundreds of thousands of guarantors under SBA programs and not only the multiplying receiverships dealing with guarantors under crisis ridden FDIC and FSLIC programs, but every contractual relationship involving the United States and third parties. Resolution of this conflict requires this Court's review.

ARGUMENT

THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS CONFLICTS WITH FEDERAL LAW AND WITH CONGRESSIONAL INTENT

The federal statute of limitations states:

> ...[E]xcept as otherwise provided by Congress, every action for money damages brought by the United States ...founded upon any contract ...shall be barred unless the complaint is filed within six years after the right of action accrues... *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right

> of action shall be deemed to accrue again at the time of each such payment or acknowledgment...

28 U.S.C. § 2415 (1978).

Despite the fact that petitioners refused to sign the modification agreement, the District of Columbia Circuit Court of Appeals held the debtor's modification agreement reset petitioners' federal statute of limitations as an acknowledgment. Partial payment is not involved. This decision is wholly contrary to the express language of the federal statute of frauds enacted by Congress for the District of Columbia, which states:

> ...an acknowledgment or promise is not sufficient ... to take the case out of the operation of the statute of limitations unless the acknowledgment or promise is in writing, *signed by the party chargeable thereby.*

D.C.Code § 28-3504 (1981)(Originally enacted 1901, re-enacted August 30, 1964 by Pub. Law 88-509, 78 Stat. 667, District of Columbia—Uniform Commercial Code, *reprinted in* 1964 U.S. Code Cong. & Admin. News 761, 773)(emphasis added).

The federal statute of frauds in the District of Columbia controls the federal statute of limitations. This is evidenced by the fact that the statute of frauds was reenacted by Congress less than two years prior to the enactment of the federal statute of limitations. Moreover, the federal statute of limitations by its own terms is applicable "except as otherwise provided by Congress." 28 U.S.C. § 2415(a). Therefore, where Congress "otherwise provided" in the federal statute of frauds that an acknowledgment must be signed to be sufficient, then the federal statute of frauds overrides the acknowledgment proviso in the federal statute of limitations. *See United States v. Framen Steel Supply Co.,* 435 F.Supp. 681, 683 (S.D.N.Y. 1977)(Finding that the District of Columbia's four year U.C.C. statute of limitations rather than the federal six year statute of limitations applied because "Congress provided otherwise by adopting the U.C.C., 77 Stat. 630 (1963), and 12 D.C.Code § 308, 77 Stat. 511 (1963), for the District of Columbia."); *United States v. Kurtz.* 525 F.Supp.734, 741 (E.D.Pa. 1984)(Finding *Framen Steel Supply* "not pertinent here because that decision turned on the enactment of the District of Columbia

statute by *Congress*, rather than by a state legislature."), *aff'd* 688 F.2d 827 (3rd Cir. 1982), *cert. denied* 459 U.S. 991 (1982).

Congress adopted the concept of acknowledgment from state law and anticipated the use of state law for interpreting the Federal statute. Indeed, the federal statute of limitation's legislative history provides:

> In a proviso to subsection (a), there is a provision that later partial payment or written acknowledgment of a debt will start the 6-year period running all over again. This provision embodies a familiar principle of law which is embodied in the *law of many States.*

S.Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 2502, 2504 (emphasis added). Clearly, Congress envisioned that state law would control the "familiar principle" of acknowledgment in the federal statute of limitations. Like the vast majority of states, Congress has made the statute of frauds part of the law of the District of Columbia. Congress legislated that a guarantor's statute of limitations is renewed only by an acknowledgment which the guarantor has signed. Petitioners did not sign the modification agreement, although it is undisputed the debtor and SBA understood petitioners' signatures to be required. The statute should not have been renewed.

Nor does the petitioners' original guaranty agreement create any agency in the debtor or SBA to contract away petitioners' personal defenses. The weight of authority holds,

> [I]t cannot, on principal, be asserted that [an agency] relationship exists between the maker and guarantor of a promissory note, or that because A has guaranteed the performance of the contract of B, A has, by such guaranty, created B his agent, authorized, as such, to make other contracts binding upon A.

Annotation, 84 A.L.R. 729, 730 (1933). As a matter of law, the many and various broad powers specifically enumerated in the guaranty agreements to extend or modify the note are deafeningly mute as to any agency to waive or toll or reset the statute of

limitations. As a matter of fact, neither the SBA nor the debtor even purported to sign the modification agreement on behalf of petitioners; petitioners' signature blanks remained blank. Even if the guaranty agreement explicitly granted SBA authority to reset the petitioners' statute of limitations such a grant would be invalid. Congress never intended that SBA would be allowed to single-handedly contract away the federal statute of limitations imposed upon it; such a construction would render the federal statute of limitations nugatory. The District of Columbia Circuit Court of Appeals decision directly conflicts with federal law and Congressional intent. This Court's power is required to reverse this manifest error.

THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT IN *UNITED STATES V. YAZELL*. 382 U.S. 341 (1966) and *UNITED STATES V. KIMBELL FOODS, INC.* 440 U.S. 715 (1979)

The District of Columbia Circuit Court of Appeals admittedly referring only to "precepts of common-law contract law and to the somewhat sparse pronouncements on this question from . . . sister circuits," found that petitioners were bound by an acknowledgment they refused to sign. In so doing, the District of Columbia Circuit Court of Appeals relied on *obiter dicta* in *Republic Nat'l Bank of Dallas v. Meridian Properties, Inc.*, 530 F. Supp. 169 (D. Colo. 1982) and inferences from *FDIC v. Petersen*, 565 F. Supp. 1007 (D. Colo. 1983), *aff'd* 770 F.2d. 141 (10th Cir. 1985), but refused to adopt clear state law to fill the interstices in the federal statute of limitations.

By usurping rather than adopting the District of Columbia statute of frauds as federal law, the District of Columbia Circuit disobeyed this Court's instruction in *United States v. Yazell,* 382 U.S. 341 (1966) that:

> [State interests] should be overridden by the federal courts *only where clear and substantial interests* of the National Government, which cannot be served consis-

> tently with respect for such state interests, *will suffer major damage* if the state law is applied...
>
> ...Clearly, in the case of these SBA loans there is no "federal interest" which justifies invading the peculiarly local jurisdiction of these States, in disregard of their laws, and of the subtleties reflected by the differences in the laws of the various States which generally reflect important and carefully evolved state arrangements designed to serve multiple purposes.

Id. at 352. (emphasis added.) In *United States v. Kimbell Foods. Inc.,* 440 U.S. 715 (1979), this Court held that indiscriminate state laws should be adopted as federal law and allowed Texas law to control the priority of U.C.C. security interests held by the United States. In *Kimbell,* Mr. Justice Marshall found that "the prudent course is to adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *Id* at 740. *See also West v. Conrail,* 107 S.Ct. 1538, 1542 (1987)(J. STEVENS: "Inevitably our resolution of cases or controversies requires us to close interstices in federal law from time to time....); *Agency Holding Corp. v. Malley-Duff & Associates,* 107 S.Ct. 2759, 2763 (1987)(J. O'CONNOR: "Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law."); *See generally,* Note, *The Parameters of Federal Common Law: The Case of Time Limitations on Federal Causes of Action,* 136 U.Pa.L.Rev. 1447 (1988); Note, *Formulating a Federal Rule of Decision in Commercial Transactions after Kimbell,* 66 Iowa L.Rev. 391 (1981)(Predicting federal courts will adopt state law in cases involving rights of guarantors). A number of federal courts have adopted nondiscriminatory state laws in construing SBA guaranty agreements. *Eg. Dupnik v. United States,* 848 F.2d 1476 (9th Cir. 1988)(six month Arizona notice requirement adopted despite federal statute giving SBA one year redemption period); *United States v. Pastos,* 781 F.2d 747, 751 (9th Cir. 1986)("Moreover, courts should not create federal law by implication that is antithetical to state laws protecting debtors unless doing so is necessary to achieve the overriding purposes of Congress in enacting the statutes under which the loans were made or

to preserve some other paramount federal interest."); *United States v. Crain*, 589 F.2d 996, 1001 (9th Cir. 1979)("As an equitable defense, [Arizona law] may be applied despite any language in the [SBA] guaranty contract..."); *Curry v. United States Small Business Administration,* 679 F.Supp.966, 971 (N.D.Cal. 1987)("The general rule is that the federal common law governing contracts in which a federal agency is a party should be that of the state in which the contract was executed, assuming the state law does not unduly impact on a valid federal interest or the policies of the federal agency entering into the contracts."). So too here, the District of Columbia Circuit Court of Appeals should have adopted the District of Columbia statute of frauds, D.C. Code Ann. § 28-3504 (1981).

Clearly no "major damage" would be suffered by SBA had the District of Columbia Court of Appeals properly adopted the District of Columbia statute of frauds. The statute of frauds is hardly a stranger to common law. Indeed, the Restatement (Second) of Contracts § 110(4) at 228 (1981) reports:

> Statutes in most states provide that no acknowledgment or promise is sufficient evidence of a new or continuing contract to take a case out of the operation of a statute of limitations unless made in some writing signed by the party to be charged.

See Restatement (Second) of Contracts at 282 (1981)(Listing forty-four states adopting the Statute of Frauds Amendment Act of 1828; Lord Tenterden's Act). The District of Columbia Circuit Court of Appeals itself has set forth the rationale of the statute, which is,

> [S]imilar to others commonly found in American jurisdictions...A conventional statute of limitations... is interrupted by a new promise to dissolve a debt, or by an unqualified acknowledgement of a debt from which such a promise might fairly be implied.... This doctrine, in the eyes of many, has been too much of an invitation to fraud and vexing litigation. A new unilateral promise or acknowledgement is easy to charge and difficult to disprove, and the stream of controversies over the

> making of oral promises and acknowledgements is potentially endless. Legislatures, including Congress, have tried to curb those consequences by imposing the requirement of a writing signed by the [chargeable party].

Nyhus v. Travel Management Corporation, 466 F.2d 440, 451 (D.C.Cir. 1972).

Without making the finding of "major damage", required by this Court in *Yazell*, the District of Columbia Circuit fashioned by implication its own governing rule of law according to its own standards rather than adopting the District of Columbia statute of frauds. Both the federal statute of limitations and the age old statute of frauds are designed to rid the courts of stale claims while lending some certainty to commercial interests that they will not be haunted by a past filled with dead witnesses and missing evidence. The Court of Appeals decision promulgating its own interpretation and rule of federal common law here thwarts the purposes of both statutes.

ABSENT A VALID ACKNOWLEDGMENT, A GENUINE JURY ISSUE REMAINS

Absent a valid acknowledgment required by the statute of frauds, a jury issue remains which the Court of Appeals in this action failed to address. The Courts below found *Nyhus v. Travel Management Corp.*, 466 F.2d 440 (1972) controlled accrual of the federal statute of limitations, stating,

> Where a demand is necessary to perfect a cause of action, the statute of limitations does not commence to run until the demand is made...To be sure, a party is not at liberty to stave off operation of the statute inordinately by failing to make demand; when statutorily unstipulated, the time for demand is ordinarily a reasonable time. That, however is a matter of the parties' expectations....

Nyhus at 452-53. Reasonableness and the parties' expectations are, of course, jury issues. *Id* at 454. If demand was dilatory so the three year District of Columbia statute of limitations, D.C. Code

Ann. § 12-301 (1981), had run against the Bank prior to assignment, then SBA's claim would be barred. *Guaranty Trust Co. of New York v. United States,* 304 U.S. 126 (1938). Therefore, absent acknowledgment, a genuine issue of material fact regarding whether demand was made within a reasonable time after default stands.

CONCLUSION

Because the District of Columbia Circuit Court of Appeals has decided this important question of federal law in conflict with federal law, with Congressional intent, and with this Court's dictates in *Kimbell Foods* and *Yazell* and because genuine jury issues remain in the absense of this error, this Court should grant a writ of certiorari if only to vacate and remand this case with directions that the Court of Appeals adopt the statute of frauds enacted by Congress.

Respectfully submitted,

Edmund S. Barnett and Mark Rollinson

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 20, 1988 Decided February 3, 1989

No. 86-5173

UNITED STATES OF AMERICA

v.

MARK ROLLINSON, et al.

EDMUND S. BARNETT, APPELLANT

No. 86-5174

UNITED STATES OF AMERICA

v.

MARK ROLLINSON, et al., APPELLANT

EDMUND S. BARNETT, et al.

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 84-03397)

Clark S. Kall for appellants in 86-5173 and 86-5174.

Paul J. Pantano, Jr., *John R. Burns* and *Brian D. Alprin* were on the brief for appellant in 86-5173.

Claire M. Whitaker, Assistant United States Attorney with whom *Jay B. Stephens*, United States Attorney, *John D. Bates*, *R. Craig Lawrence* and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief, for appellee. *Mary Coster Williams*, Assistant United States Attorney, also entered an appearance, for appellee.

Before WALD, *Chief Judge*; MIKVA and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

SENTELLE, *Circuit Judge*: Defendants, Edmund S. Barnett, Sr., and Mark Rollinson, appeal from the District Court's grant of summary judgment in favor of the United States for the unpaid principal and interest due and payable on a Small Business Administration ("SBA") loan secured by loan guarantees they executed. *United States v. Rollinson*, 629 F. Supp. 581 (D.D.C. 1986). In granting the government's motion, the Court rejected appellants' arguments that the claim was time-barred and that certain deferrals and alleged modifications of the original contract released them as guarantors. *Id.* at 583-86. Appellants renew these contentions before this Court and additionally argue that the District Court erroneously granted summary judgment, as there were outstanding issues of material fact. We disagree and affirm, although for reasons assigned as an alternative theory by the District Court.

I. BACKGROUND

On October 16, 1973, Sounds Reasonable, Inc. ("SRI" or "the Company"), a now defunct District of Columbia corporation which owned and operated a recording studio, produced music, and performed other creative audio services, entered into a loan agreement with the District of Columbia National Bank of Washington ("Bank"). The loan of $120,000 at eleven percent annual interest was secured in part by a promissory note

payable, both principal and interest, in monthly installments of $2,055 until the date of maturity, October 16, 1980. SBA guaranteed ninety percent of the loan pursuant to a Loan Guarantee Agreement it had entered into with the Bank that year. In order to induce the Bank loan and the SBA guarantee, the appellants and three other individuals personally guaranteed the loan's repayment.[1]

Contrary to the expectations of all involved, SRI was unable to meet its obligations. According to appellant Rollinson's affidavit, SRI was in arrears "within a few months after the loan was made." Joint Appendix ("J.A.") D7. Bank records reflect delinquencies in repayment as early as September, 1974. J.A. C151. By November 11, 1974, SBA had been made aware that "[t]he company is in bad financial shape and according to the bank, the future looks bleak." J.A. E39. By its terms, SBA's Loan Guaranty Agreement required SBA approval of any "alteration in the terms" of the loan. J.A. G61. And, pursuant to the Bank's request, on November 12, 1974, SBA approved the first of at least five deferrals of principal payments granted SRI. J.A. E40.

Over the next three years, SRI's financial woes continued. On April 1, 1977, after a series of deferrals and missed payments, the Bank alerted SRI and the loan's guarantors to the Company's renewed delinquencies and expressed its intent to demand payment in full under the acceleration clauses of the note and guaranty agreements unless certain corrective steps were taken. J.A. C165-67. When the measures were not forthcoming, the Bank made a similar demand on December 22 of the same year. Because of SRI's continuing failure to meet its obligations as they came due, on March 30, 1978, the Bank made demand on SBA for payment of the guaranteed

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[1] Of the three others who jointly and severally guaranteed the debt, one is dead, one has settled with the government, and the whereabouts of the third is unknown.

portion of the loan. The note was assigned to SBA on April 11, 1978. J.A. C175.

Although it appears that SRI had not made a single payment since September, 1977, it and SBA entered into a modification agreement on February 5, 1979, whereby SRI's past installments were deferred, the maturity date of the note was extended by nine years (to October 16, 1989), and the monthly installments were reduced by approximately one-third (to $1,364 per month). J.A. E51. SRI made its only payment under the new arrangement in March, 1979; consequently, on October 25, 1979, SBA made demand upon the note's guarantors for $99,100 in principal and $18,844 in interest. J.A. A17-20. The demand was not honored, and on November 6, 1984, SBA filed this action.

II. Discussion

According to appellants, the District Court erred in granting the government's motion for summary judgment because "[a] viable issue of fact [exists] as to when the limitations period began." Brief for Appellant Barnett at 16.

Summary judgment is appropriate under Federal Rule of Civil Procedure 56(c) on demonstration "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." It is the moving party who bears the onus of establishing his entitlement to summary judgment, and it takes but little evidence to create an issue for trial. *See Kozup v. Georgetown University*, 851 F.2d 437 (D.C. Cir. 1988); *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981). It is axiomatic that "the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The substantive law at issue here, the statute of limitation of actions brought by the United States and

founded upon a contract, 28 U.S.C. § 2415(a) (Supp. IV 1986), requires that the action be "filed within six years after the right of action accrues . . . *Provided*, That in the event of later partial payment of written acknowledgement of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement[.]" There is no contention that § 2415 (a) does not apply; rather, the controversy concerns the import of its terms.

When did SBA's right of action accrue?

The parties challenge the District Court's choice of the triggering mechanism for the running of the statute, which, according to the Court, was the date " 'when the claim first could be sued upon, rather than within six years of when the [g]overnment acquired the claim.' " 629 F. Supp. at 583 (quoting *United States v. Cardinal*, 452 F. Supp. 542, 545 (D. Vt. 1978)). In deciding when "the claim first could be sued upon," the District Court relied heavily on the fact that the guaranties at issue provide that the " '[h]older is authorized to declare all or any part of the indebtedness immediately due and payable upon the happening of any of the following events: (1) Failure to pay any part of the indebtedness when due.' " *Id.* at 584. The Court noted that this language vests authority in the holder to determine when the debtor was in default. *Id.* Relying primarily on authority from outside this Circuit, the Court reasoned that because "the right to accelerate the installment payments was at the option of the holder, the cause of action was not perfected until a demand was made." *Id.* Thus, it accepted the government's argument that because SBA made demand on October 25, 1979, its right of action accrued on that date, and because suit was brought within six years (on November 6, 1984), the action was timely filed. *Id.*

Appellant Rollinson contends that the Court erred in failing to recognize that the claim could have been pursued much sooner than it was, as "SRI was in default practically from the start back in 1973." Brief for Appellant Rollinson at 23. Appellants rely on authority from this Court that when demand is necessary to commence the running of the statute of limitations, "a party is not at liberty to stave off operation of the statute inordinately by failing to make demand; when statutorily unstipulated, the time for demand is ordinarily a reasonable time." *Nyhus v. Travel Management Corp.*, 466 F.2d 440, 452-53 (D.C. Cir. 1972) (footnote omitted). Thus, appellants argue, because SRI was in arrears, and because their understanding was that the note would be declared in default at the first sign of trouble, the Bank "waited unreasonably too long" in making its demand. Brief for Appellant Rollinson at 23. At the very least, they contend, a triable issue exists as to the reasonableness of the holders' delay.

The District Court recognized that *Nyhus* presents a holder of a note from delaying unreasonably in making its demand, but contrary to appellants' contentions, the Court found that any delay by the Bank and SBA could "hardly be characterized as unreasonable," 629 F. Supp. at 584 n.2, concluding that it would be "simply unreasonable to expect the SBA to call in loans at the first sign of trouble." *Id.* at 585. Moreover, "[e]ven if the SBA's failure to make demand for six months following [the April 16, 1979] default was unreasonable, the Court would still be compelled to conclude that the agency's right of action accrued on or about April 16, 1979," the date of SRI's first missed payment under the modified repayment schedule. *Id.* at 584 n.2. For the reasons we discuss below, it appears that April 16, 1979, would be the earliest date the statute could have begun to run.

Appellant Barnett alternatively contends that the cause of action accrued "when the government suffer[ed] its loss," that is, when SBA reimbursed the Bank for its

loss on April 11, 1978. Reply Brief for Appellant Barnett at 2. Substantial authority can be found for this position. In *United States (SBA) v. Corsino*, 648 F. Supp. 454 (D.P.R. 1986), for example, the court held that the statute of limitations begins to run against SBA "at the time the government reimburses the lender for its loss arising from borrower's default." *Id.* at 456. *See also United States v. Baker*, 681 F. Supp. 750 (M.D. Ala. 1987) (same); *FDIC v. Hinkson*, 848 F.2d 432, 435 (3d Cir. 1988); *FDIC v. Fonseca*, 795 F.2d 1102, 1108-09 (1st Cir. 1986); *United States v. Klotz*, 599 F. Supp. 301, 302 (D. Conn. 1984); *FDIC v. Cardona*, 723 F.2d 132, 134 (1st Cir. 1983) (suggesting in dictum that statute begins to run when FDIC acquires claim).

Some courts have reached the same conclusion on the basis of common-law suretyship principles. In *United States v. Tilleraas*, 538 F. Supp. 1 (N.D. Ohio 1981), for example, the district court held that the government's cause of action against the guarantor of a defaulted student loan accrued neither on default by the borrower nor on the acceleration of the unpaid balance, but, "under a suretyship theory the cause of action accrues on the date the surety pays the principal's debt." *Id.* at 6. *See also United States v. Frisk*, 675 F.2d 1079 (9th Cir. 1982); *United States v. Kendrick*, 554 F. Supp. 121 (E.D. Ark. 1982).

While we are not unimpressed with the reasoning in these cases, we see no reason why our previous pronouncement in *Nyhus* should not guide our decision here. Certainly, the guaranties at issue here are ones "[w]here a demand [was] necessary to perfect a cause of action." *Nyhus*, 466 F.2d at 452. And, while we have never had occasion to apply *Nyhus* to a situation where the government sought collection on a personal guaranty, numerous other courts have applied the same rule in such a context.

United States v. Cardinal, 452 F. Supp. 542 (D. Vt. 1978), involved a defaulted home loan insured by the Federal Housing Administration. The court rejected both the government's contention that its right accrued when it was assigned the loan from the bank and appellant's argument that the government's right accrued when she first defaulted. Rather, *Cardinal* held that the government's right accrued under section 2415(a) when its assignor, the bank, originally invoked the note's acceleration clause and demanded payment of its balance. *Id.* at 547. The court noted that the acceleration clause permitted the lender to treat the entire debt as due upon the failure to make a payment. Until accelerated, however, the maturity date remained unchanged. Thus, the District Court concluded that because acceleration was optional on the part of the holder, " 'affirmative action . . . must be taken to make it known to the debtor that he has exercised his option to accelerate.' " *Id.* at 547 (quoting *Moresi v. Far West Services, Inc.*, 291 F. Supp. 586, 588 (D. Hawaii 1968)).

While *Cardinal* has been criticized for incorrectly "assum[ing] that the only theory of recovery available to the government is an action on the underlying obligation, as an assignee of the note from the original lending institution," *Tilleraas*, 538 F. Supp. at 5, we note that at least two of our sister circuits have applied similar rules when the government has acted under acceleration clauses. *See United States v. Gilmore*, 698 F.2d 1095, 1097 (10th Cir. 1983); *United States v. Alessi*, 599 F.2d 513 (2d Cir. 1979) (per curiam); *see also United States v. Feterl*, 849 F.2d 354, 356-57 (8th Cir. 1988) (correctly noting differences in language between *Gilmore* and *Cardinal*, but nevertheless concluding that under either case, "a lender must, at least, have invoked the acceleration clause in the loan agreement" before the limitations period would begin).

Indeed, the majority of cases where SBA has acted under a note's acceleration clause and has sought collection against the loan's personal guarantors have held that its right of action accrues under section 2415(a) only after acceleration. *See Gilmore*, 698 F.2d at 1097 ("SBA notified the defendants that it exercised the acceleration clause . . . . The cause of action then accrued."); *United States v. Frey*, 1988 U.S. Dist. LEXIS 8262 (D. Kan. 1988) ("earliest point at which the statute began to run" was date of acceleration and demand); *United States v. Hanson*, 649 F. Supp. 100, 105 (D. Me. 1985) (holding right accrued "when the SBA accelerated the note and demanded payment by the guarantors"); *cf. Curry v. United States (SBA)*, 679 F. Supp. 966, 970 (N.D. Cal. 1987) (relying on *Nyhus* and holding right accrued "at least by the date on which a reasonable person would have declared the note in default"); *United States v. Kurtz*, 525 F. Supp. 734, 739 n.10 (E.D. Pa. 1981), *aff'd without opinion*, 688 F.2d 827 (3d Cir.), *cert. denied*, 459 U.S. 991 (1982) ("Normally, the cause of action would not accrue until the guarantor dishonored the demand.").

In short, we see no reason why the *Cardinal-Nyhus* line of cases should not govern in the present case. However, we need not decide this question, for as we explain below, whenever the statute originally began to run, it ceased running under the terms of section 2415(a)'s first proviso when SRI and SBA entered into their February, 1979, modification agreement. Since this modification occurred within six years of the time this action was filed, we need not decide whether the District Court erred by determining that under *Cardinal* and *Nyhus* SBA acted reasonably in delaying demand before that time.[2]

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[2] In light of our holding, we need not and do not express an opinion as to whether the Bank and SBA are treated as one in determining when SBA's cause of action originally accrued. *Compare United States v. Cardinal*, 452 F. Supp. at

Effect of 1979 modification

In providing for a six-year period of limitations, section 2415(a) includes the following proviso: "in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment." The legislative history of the section confirms that the proviso was designed to codify "a familiar principle of law," which is that "[t]he obligation of a debt will continue where a debtor has acknowledged the debt and indicated his willingness to discharge the obligation." S. Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 2502, 2504.

Lacking any authority from this Circuit to aid in our interpretation of the proviso, we look to the precepts of common-law contract law and to the somewhat sparse pronouncements on this question from our sister circuits.

Generally, in the common law, where a debtor unequivocally acknowledges and evidences a sufficient commitment to pay a preexisting debt, the law will treat the acknowledgment as a new promise to pay. *See* 1A A. Corbin, *Corbin on Contracts* § 216 (1963) ("an acknowledgment that a sum of money is actually due, if made without any accompanying denial of willingness, justifies the inference of a promise to pay") (footnote omitted). The second promise, implied from the acknowledgment, is said to have been supported by either "past" or "moral" consideration. The acknowledgment may also have the effect of lifting the bar of the statute of limi-

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547 (derivative claim asserted by government accrues when claim first actionable, whether or not government is holder at that time) and *United States v. Blackmon*, 496 F. Supp. 1250 (E.D. Ark. 1980) (same) *with FDIC v. Hinkson*, 848 F.2d at 435 (criticizing *Cardinal*).

tations, thereby extending the time for enforcement to the full limitations period commencing with the new promise. *See id.* § 214 (the debtor's promise "is supported by the 'past consideration.' Though the debtor was protected by a legal bar, he is regarded as still under a moral obligation to pay the barred debt.") (footnote omitted); *see also Mattingly v. Boyd*, 61 U.S. (20 How.) 128, 131 (1858); *United States v. Glens Falls Ins. Co.*, 546 F. Supp. 643, 645 (N.D.N.Y. 1982).

An entirely different question is raised where, as here, it must be ascertained whether the debtor's acknowledgment can be the basis for tolling the statute as to the debt's guarantors. If an enacting section 2415(a), Congress contemplated the proviso's application to those secondarily liable on a debt, it did not express this intent. Accordingly, we consult other sources for the law.

There is substantial authority for the proposition that partial payments on a note by a principal debtor do not toll the statute as to the note's guarantors. Leading and trusted authorities inform us that this is, in fact, the general rule. *See, e.g.*, 38 Am. Jur. 2d *Guaranty* § 121 (1968) ("It has generally been held that a payment by the principal debtor does not have the effect of tolling the statute of limitations as to the guarantor.") (citations omitted); Annotation, *Acknowledgment, new promise, or payment by principal as tolling Statute of Limitations as against guarantor* ("Annotation"), 84 A.L.R. 729 (1933) ("In most of the jurisdictions . . . a payment by a principal debtor will not operate to toll the Statute of Limitations as to a guarantor of the debt."). The rule has never been followed universally or in its pristine form. Some jurisdictions, for example, differentiate between debts that are barred by the statute when the new promise is made and those that are not, holding that a new promise will renew a claim against guarantors only in the case of the latter. *See* 51 Am. Jur. 2d *Limitation of Actions* § 352 (1970) ("Generally speaking, a principal's

subsequent acknowledgment or new promise does not revive the liability, upon a barred obligation, of a guarantor or surety. On the other hand, in some jurisdictions it seems that a promise made by the principal before the bar has attached will suspend the running of the statute as to the surety, but that payments or promises made afterward will not revive the claim."), and cases cited therein. Some jurisdictions, however, have rejected the rule in its entirety. *See, e.g., Conn v. Atkinson*, 227 Ky. 594, 13 S.W.2d 759 (1929) (partial payments toll statute as against debtor and guarantors); *Hooper v. Hooper*, 81 Md. 155, 31 A. 508, 511 (1895) ("the liability of the guarantors, being coextensive with [that of the principal], was [treated equally] by the statute").

The reason for treating the principal debtor and the guarantor differently upon a subsequent promise or acknowledgment by the debtor is straightforward and sensible: A guarantor's consent to the debtor's future conduct may not be presumed merely on the basis of the original guarantee. Thus,

> it cannot, on principle, be asserted that [an agency] relationship exists between the maker and guarantor of a promissory note, or that because A has guaranteed the performance of the contract of B, A has, by such guaranty, created B his agent, authorized, as such, to make other contracts binding upon A[.]

Annotation, 84 A.L.R. 729, 730 (1933) (quoting *Aiken v. Nance*, 28 Haw. 275 (1925)). This being the basis of the rule, one would expect that the parties could by agreement alter its general effect. This is indeed the case. Thus, where the guarantor undertakes the responsibility of guarantying the principal's future undertakings, he may be held liable as a guarantor even if he did not specifically agree to guarantee a particular loan. *See, e.g., Valley Nat'l Bank of Arizona v. Foreign Car Rental, Inc.*, 157 Colo. 545, 549, 404 P.2d 272, 274-75 (1965) ("The

all-inclusive language covering loans then existing or thereafter to be made, or any renewals thereof, required no further communication from the guarantors.").

Moreover, where the guaranty agreement grants power to the principal debtor to extend or renew the debt, courts have held that the statute is tolled as to both the principal debtor and the guarantor by such a new agreement. *Republic Nat'l Bank of Dallas v. Meridian Properties, Inc.*, 530 F. Supp. 169 (D. Colo. 1982), is such a case. There, the district court was confronted with an agreement reached by the principal debtor (Meridian Properties) and its creditors that reinstituted an accelerated loan's original repayment schedule. Plaintiff bank, the holder of the note, contended that the agreement "re-set the statute of limitations" as to the guarantors of the note in question. The court agreed, emphasizing that the original guaranty agreement permitted the principal debtor to "renew or extend any obligations of Meridian and/or of co-guarantors." Consequently, it held that

> [b]ecause defendant . . . was a continuing guarantor for Meridian, for its new obligations and for its renewals and extensions, he was bound by the subsequent settlement agreement, even though he did not personally sign it. He therefore cannot assert a statute of limitations defense that totally ignores the settlement agreement.

Id. at 172 (footnote omitted).

Conversely, where the relevant agreement provides for extensions or renewal of the note, the statute will not be tolled as to the guarantors by mere partial payment by the debtor. *Wellington Nat'l Bank v. Thomson*, 9 Kan. App. 667, 59 P. 178 (1899), made this very point nearly a century ago. There the Kansas Court of Appeals construed a promissory note which extended to the holder the power to extend the note without notice. The court was unwilling to hold that the statute of limita-

tions could be suspended as to a surety by the debtors' payments of interest upon the note: "The word 'extension,' used [in the note], must be understood as meaning an actual extension of the time of payment . . . . The act of other signers of the note in paying interest already accrued, or making part payment of the principal, did not suspend the running of the statute, so far as [the surety] was concerned." 59 P. at 178. *Cf. Elk Horn Bank & Trust Co. v. Spraggins*, 182 Ark. 27, 30 S.W.2d 858, 859 (1930) (distinguishing the effect of partial payment and extension or renewal in the context of a vendors' lien).

To summarize, the general rule—that changes by the principals will not affect the running of the statute of limitations against a guarantor—presumes the absence of consent to the changes. Thus, where a guaranty does not vest in the holder the right to extend or modify the note, such conduct will not affect the running of the statute against the guarantor. Likewise, where a guaranty agreement permits extension or renewal, mere partial payment does not affect the guarantor. The general rule will, however, yield when an agreement vests these powers and when the powers are exercised. This analysis helps explain the Tenth Circuit's decision in *FDIC v. Petersen*, 770 F.2d 141 (10th Cir. 1985), upon which appellants rely.

In *Petersen*, three individuals guaranteed a loan to Meridian Properties, and by the terms of the guaranty agreements expressly consented to any future extensions or renewals of the note. FDIC acquired the note, and because the borrower had defaulted, sued to enforce the guaranties. The guarantors contended that the claim was time-barred because the suit was filed six years and three months after the note matured. FDIC argued that because Meridian's accountant had sent the lending bank a financial statement listing the loan as a liability, Meridian had "acknowledged" the debt within the mean-

ing of section 2415(a), thereby suspending the statute of limitations as to the guarantors. After assuming that the statement constituted an acknowledgment under section 2415(a), the district court concluded that the acknowledgment did not toll the statute against the guarantors. It rejected as "sophistry" FDIC's argument that because the guaranties vested in Meridian the right to extend or renew the note, the acknowledgment constituted such a renewal or extension. *FDIC v. Petersen*, 565 F. Supp. 1007, 1010-11 (D. Colo. 1983).

After stating that the question presented "an issue of first impression in federal courts," 770 F.2d at 143, the Tenth Circuit affirmed. In reaching its decision, the Court was careful to distinguish extension or renewal—powers that the guaranty agreements vested in Meridian—from mere acknowledgment of the debt:

> FDIC argues that the guaranties permitted the extension or renewal of the note and Meridian's acknowledgment of the debt constituted such a renewal to which the guarantors gave prior consent by signing the guaranties. The district court characterized the argument as "sophistry." . . . We agree. Extension or renewal of a note refers to a binding agreement supported by consideration to postpone the maturity date of a note or to replace it with a new contract. *Elk Horn Bank & Trust Co. v. Spraggins* . . . ; *Wellington National Bank v. Thomson* . . . . Acknowledgment or part payment of the debt does not constitute a new agreement. It only suspends the running of the statute of limitations against the party making such acknowledgment or partial payment.

Petersen, 770 F.2d at 143 (citations omitted). In light of the foregoing, apellants' reliance on the case for the proposition that a debtor's "modification ha[s] no effect on the running of the statute of limitations as to [guarantors]," Reply Brief for Appellant Rollinson at 12, is clearly misplaced. To the contrary, the Court indicated

that the limitations period continued to run against the guarantors precisely because there was no modification. The Court carefully differentiated a renewal or extension from a mere acknowledgment. Had there been an "agreement supported by consideration to postpone the maturity date of the note," the clear implication is that the statute would have accrued again against the guarantors. This interpretation is buttressed—if not confirmed—by the Court's reliance on *Spraggins* and *Thomson*.

In contrast, the 1979 agreement at issue here, entitled "Modification of Promissory Note," provided in part that

> the terms and conditions of Borrower's Note, as above described, are hereby modified as follows:
>
> (1) That the principal portion of installments due 9/16/77 through 2/16/79 be deferred to the maturity of the Note.
>
> (2) That the monthly installments of $2,055.00 be reduced to $1,364.00 per month effective 3/16/79.
>
> (3) That the maturity of the note be extended from 10-16-80 to 10-16-89.
>
> It is further understood and agreed that all other terms, conditions and co[]venants of the foresaid Note, not otherwise modified hereby, shall be and remain the same, and that this Agreement, when executed by the parties hereto, shall be attached to and become a part of the original Note, and shall have the same force and effect as if the terms and conditions hereof were originally incorporated in the Note, prior to its execution.

J.A. E51.

The 1979 refinancing transaction did not constitute a mere acknowledgment or partial payment, which under our analysis would not have restarted the statute of limitations with respect to the guarantors. Rather, it amounted to an "agreement supported by consideration

to postpone the maturity date of a note." *Petersen*, 770 F.2d at 143. The modification agreement postponed the maturity date nine years, meeting one of the chief conditions described in *Petersen*. The parties also noted that the refinancing was "mutually desirable, beneficial and argee[a]ble, and that they acted "in consideration of the mutual benefits inuring to each other." J.A. E51. This is an indication that there was ample consideration for the transaction.

A recent decision from the same circuit is not to the contrary, and, indeed, is entirely consistent with this analysis. In *FDIC v. Galloway*, 856 F.2d 112 (10th Cir. 1988), the court had before it guaranty agreements which, while continuing in nature, did not include a clause permitting the principals to extend or modify the original note. The FDIC contended that because the original loan was extended in exchange for partial payments on the original debt by the borrower, the statute of limitations was tolled as to the guarantors of the original note. Applying *Petersen*, the court disagreed. While the relevant agreements guaranteed "all existing and future indebtedness and liability of every kind," the court could not agree that the lender's extensions of the maturity dates qualified as the sort of "new and separate debts" contemplated by the agreements. *Id.* at 117.

In the present case, as in *Meridian Properties* and *Petersen*, and quite unlike the guaranties in *Galloway*, the guaranties provided in no uncertain terms that SRI was permitted to modify, extend, or renew the original note:

> The Undersigned hereby grants to Lender full power, in its uncontrolled discretion . . . to deal in any manner with the Liabilities and the collateral, *including . . . [the power to] modify or otherwise change any terms* of all or any part of the Liabilities or the rate of interest thereon (but not to increase the principal amount of the note of the

> Debtor to Lender), *to grant any extension or renewal thereof* and any other indulgence with respect thereto, and to effect any release, compromise or settlement with respect thereto[.]

J.A. A6 (emphasis added). That it was SBA rather than the lender Bank that entered into the modification agreement with SRI is of no import. As assignee of the Note, it acquired the right.

It is also noteworthy that in this case, unlike *Galloway*, the guaranties provided that the guarantors would, upon default, be required to pay "in like manner as if such amount constituted the[ir] direct and primary obligation." J.A. A6. Under such a clause, the guarantors' derivative liability more closely approximates that of the primary debtor.

Appellants seek to avoid the clear import of the above-quoted language by pointing to a clause in the guaranties which makes the power to modify "subject to the provisions of any agreement between the Debtor or any other party and Lender at the time in force." *Id.* While appellants argue that they had agreed with the principals that their consent was needed to modify the note, no substantial evidence to this effect was before the District Court. It is true that Rollinson's affidavit stated that on at least five occasions his consent to certain alleged modification agreements was requested. There was also evidence before the District Court that the Bank corresponded with the guarantors on several occasions, seeking their consent to the principal deferrals.

However, the record is bereft of any specific fact demonstrating there was any such agreement. Careful inspection of the affidavits to which appellants direct our attention reveals no assertion that such an agreement existed. To the contrary, appellants' affidavits are silent on the point. *See* J.A. C16-18, D7-8. The unsigned documents that appellants claim to be copies of executed modification and extension agreements likewise are of

no avail. Even if we were to assume that they were executed, they do not establish that there was a prior agreement to require the guarantors' consent. As for appellants' contention that the Bank "would not have . . . wasted so much time and energy" securing their consent absent a contractual obligation to do so, Brief for Appellant Rollinson at 34, this sort of hypothesizing is not sufficient to withstand a properly supported motion for summary judgment. While the nonmoving party is entitled to every reasonable inference, he "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Modifications and deferrals as effecting release of guarantors

Having concluded as we have that the running of the statute ceased with the extension in 1979, we address one last issue: Whether the District Court erred in finding that the numerous deferrals of principal payments and modifications of the original note did not release appellants as guarantors. If we were to find that the Court erred in so finding, appellants would be released without regard to the fact that the action was timely filed; however, we find no such error. As for the deferrals, the Court concluded that they "simply did not modify or alter the underlying contract, and in any event, the guaranty agreements expressly permitted such extensions." 629 F. Supp. at 584. The District Court also found that the record established the existence of only a single modification, rather than five as appellants asserted. In any event, the Court concluded that the number of modifications was irrelevant, for, "as previously noted [in the deferral discussion], the guaranty agreements specifically permitted the holder of the note to modify the terms, and . . . defendants remained liable." *Id.* at 586.

Appellants' renewed contentions of release need detain us only briefly. They rely primarily on two cases where

alterations of the original note released the note's guarantors: *Bank of Nova Scotia v. St. Croix Drive-In Theatre, Inc.*, 552 F. Supp. 1244 (D.V.I. 1982), *aff'd*, 728 F.2d 177 (3d Cir. 1984); and *Reliance Ins. Co. of Philadelphia v. Colbert*, 365 F.2d 530 (D.C. Cir. 1966). These cases are quite clearly inapposite, as in neither case did the guarantors vest in the principal parties the right "to deal in any manner with the Liabilities and the collateral, including . . . [the power to] modify or otherwise change any terms of all or any part of the Liabilities or . . . to grant any extension or renewal thereof," J.A. A6, as was the case here. Where rights comparable to these are vested in the principals, the guarantor is not released by the contemplated alterations. *See, e.g., First Commercial Corp. v. Geter*, 37 Colo. App. 391, 547 P.2d 1291, 1294 (1976) ("Where the guaranty contract contains a provision which authorizes a change in the terms of the principal contract, a change within the scope of that authorization does not discharge a guarantor."). Indeed, 38 Am. Jur. 2d *Guaranty* § 94 at 1100 (1968), speaks directly to the question before us:

> A guarantor is bound by an agreement in the guaranty contract which permits extensions of time for the performance of the principal contract. When such an agreement is included in the guaranty contract, an extension of time within the intent of the agreement does not discharge the guarantor.

Id. (footnote omitted). Having vested these powers in the principals, appellants cannot claim that they were released by their exercise. *Cf. United States v. Warwick*, 695 F.2d 1063, 1070-71 (7th Cir. 1982).

Appellants again argue that this broad grant of power was negated by a separate agreement which required their consent to alter the original note. However, we must reject the argument for the reasons discussed above. Appellants ask this Court to consider the difficulty of proving an agreement fifteen years after the fact. While

we recognize the difficulty, to withstand a properly supported motion for summary judgment the nonmoving party must produce some evidence; after an adequate period of discovery, it is simply not enough to give a good reason for having none. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In sum, appellants failed in their obligation to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec.*, 475 U.S. at 587 (citations and emphasis omitted).

III. Conclusion

Absent evidence that the guarantors' consent was required to modify the note, and given the guaranties' broad vesting of power to the holder to modify or extend the loan, we hold that the 1979 modification agreement effectively renewed the statute of limitations against the guarantors. Because this action was filed within six years of that extension, and because appellants were not released as guarantors, the judgment of the District Court is accordingly

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK ROLLINSON, et al.

Defendants.

CIVIL ACTION NO. 84-3397

MEMORANDUM OPINION AND ORDER

This case is before the Court on cross-motions for summary judgment. The United States seeks monies from defendants Edmund S. Barnett, Sr., and Mark Rollinson pursuant to guaranty agreements they executed in favor of the Small Business Administration ("SBA"). Defendants do not dispute the validity of the agreements they signed or that they have not made payments under them. Rather, they claim the action is time-barred and that in any event they were discharged from liability by virtue of alterations of the underlying obligation made by the SBA without their consent. Defendant Barnett, Sr., further argues that this Court lacks personal jurisdiction over him.

I. Background

In October 1973, Sounds Reasonable, Inc. ("SRI"), executed a promissory note in favor of the District of Columbia National Bank (the "Bank"), promising to repay a loan in the principal amount of $120,000, plus interest at a rate of 11 percent per annum. The SBA had previously entered into a Loan Guaranty Agreement with the Bank on April 26, 1973, which provided that the Bank could not make or consent to any alteration in the terms of any loan agreement without SBA's prior written consent. To further induce the Bank to make the loan, SRI secured unconditional guarantees from defendants Edmund Barnett, Sr. and Mark Rollinson, as well as Frances Sherertz (formerly Frances Barnett),

Edmund S. Barnett, Jr. (president of SRI), and Gary Burke.[1] Each defendant signed a separate agreement in which they guaranteed the due and punctual payment of the $120,000 due under the note, and further gave the SBA the authority to modify the terms of the note.

Between November 11, 1974 and October 27, 1976, the Bank granted, at SRI's request, five deferrals of payments of principal, permitting the amounts deferred to be paid in a balloon payment at the maturity date. The Bank charged no additional interest, did not alter the amount of principal due and did not change the note's maturity date.

On April 1, 1977, and again on December 22, 1977, James A. Read, Vice President of the Bank, wrote defendants and informed them of SRI's defaults and delinquencies on the loan. The Bank did not demand payment in full, but rather requested that SRI's account be brought current. On April 11, 1978, the Bank assigned SRI's promissory note and the guaranty agreements executed by defendants to the SBA; the agency completed its purchase of the guaranteed portions of the loan on May 12, 1978. Several months later, Edmund S. Barnett, Jr., requested that the SBA refinance the loan, and on February 5, 1979, the SBA and SRI, through Barnett, Jr., executed a modification of the note. The modification deferred payment of overdue principal until the maturity date; reduced the monthly installments from $2,055 to $1,364; and pushed back the maturity date until October 16, 1989. The parties to this modification did not believe they needed the consent of the guarantors and evidently did not seek it. *

SRI made a payment under the modified note on March 26, 1979, but failed to meet its next payment on April 16, 1979. On October 25, 1979, the SBA sent demand letters to each guarantor declaring that the entire balance was due and payable. The col-

[1] Edmund Barnett, Jr., has been discharged in bankruptcy and the whereabouts of Gary Burke are not known. The government, therefore, did not name them as defendants. Frances Sherertz and the government reached a settlement agreement, and Sherertz was dismissed from the case on October 1, 1985.

* [Petitioners' Note: On appeal the government conceded the evidence showed SBA officials did believe petitioners' consent was necessary and SBA and SRI did seek petitioners' consent and signature on the modification.]

lateral securing the loan was sold on or about November 30, 1979, for approximately $17,000, and the SBA applied this amount to the outstanding debt. The government filed suit on November 6, 1984, seeking $153,710.45 in outstanding principal and interest accrued up through October 10, 1984, interest accruing from that date to the date of judgment at a daily rate of $30.27, and interest at the legal rate from the date of judgment until paid.

II. Analysis

A. The Statute of Limitations

Actions brought by the United States government upon any contract must be filed "within six years after the right of action accrues ...." 28 U.S.C. § 2415(a) (1982). The relevant inquiry, therefore, is when the SBA's cause of action first accrued. Defendants argue that it ripened on April 1, 1977, the date on which the Bank first declared that SRI had defaulted on certain loan repayments, or alternatively, on May 12, 1978, the date the Bank assigned the note to the SBA. The Court cannot agree.

Defendants are correct in stating that under section 2415(a), the statute begins to run "when the claim first could be sued upon, rather than within six years of when the [g]overnment acquired the claim." *United States v. Cardinal*, 452 F. Supp. 542, 545 (D. Vt. 1978). Relying on a series of cases involving federally insured student loans, defendants contend that suit can be brought on a promissory note, and thus a right of action accrues, when the borrower fails to make timely payments. Those cases are inapposite, however, because the statute creating the student loans at issue expressly provided that "default" occurred when the borrower was in arrears in payments 120 days after he or she was obligated to commence repayments. *See United States v. Lucas*, 516 F. Supp. 934, 935 n.3 (E.D. Tex. 1981), *United States v. DeGusta*, 512 F. Supp. 1299, 1301 (E.D. Cal. 1981). In those cases, therefore, the borrower's default could be ascertained with mathematical certainty. The promissory note at issue here, by contrast, gives the holder of the note the authority to determine when the debtor is in default. It provides that the "[h]older is authorized to declare all or any part of the indebtedness immedi-

ately due and payable upon the happening of any of the following events: (1) Failure to pay any part of the indebtedness when due ...." Plaintiff's Complaint, Exhibit A. It is well settled that

> where the acceleration of the installment payments in cases of default is optional on the part of the holder, then the entire debt *does not become due on the mere default of payment* but affirmative action by the creditor must be taken to make it known to the debtor that he has exercised his option to accelerate ....

United States v. Cardinal, 452 F. Supp. at 547 (quoting *Moresi v. Far West Services, Inc.*, 291 F. Supp. 586, 588 (D. Hawaii 1968) (emphasis supplied)); *see also United States v. Gilmore,* 698 F.2d 1095, 1098 (lOth Cir. 1983) (SBA's cause of action accrued when it exercised its option under acceleration clause and statute of limitations began to run on that date); *Nyhus v. Travel Management Corp.,* 466 F.2d 440, 453 (D.C. Cir. 1972) (where contract envisions demand, statute of limitations set in motion only by such demand). Accordingly, while the Bank had the right to demand payment on April 1, 1977, and likewise the SBA possessed the same right on May 12, 1978 when it purchased the note, neither exercised that right at those times. As the right to accelerate the installment payments was at the option of the holder, the cause of action was not perfected until a demand was made. The SBA first made such demand on October 25, 1979, and thus its right of action accrued on that date. The government filed this action on November 6, 1984, well within the six-year statutory period.[2]

[2] It is true, as defendants note, that "a party is not at liberty to stave off operation of the statute [of limitations] inordinately by failing to make demand." *Nyhus v. Travel Management Corp.,* 466 F.2d at 452-53. Here, the Bank and the SBA granted SRI several deferrals on principal payments between 1974 and 1978, and refinanced the loan in 1979. This action can hardly be characterized as unreasonable in view of the SBA's mandate to assist in the development of small businesses. Indeed, after these deferrals SRI did commence payment. SRI's final default took place on April 16, 1979. Even if the SBA's failure to make demand for six months following that default was unreasonable, the Court would still be compelled to conclude that the agency's right of action accrued on or about April 16, 1979, and thus, that its filing of this action on November 6, 1984 was within the statutory period.

B. Modification of the Contract

The Deferrals

Defendants argue that the seven deferrals that the Bank and the SBA granted SRI modified and altered the terms of the note and thereby discharged them from their liability as guarantors. It is, of course, true that alterations in the underlying contract between a principal debtor and a creditor discharge a guarantor. *See* 10 *Williston on Contracts* § 1222 (3d ed. 1967). Here, however, the extensions or deferrals simply did not modify or alter the underlying contract, and in any event, the guaranty agreements expressly permitted such extensions.

In *United States v. Bachman,* 601 F. Supp. 1537 (E.D. Wisc. 1985), defendant argued that she was discharged from liability as a guarantor by virtue of an agreement between the SBA and the principal debtor in which the SBA extended the interest period, deferred payments of past due amounts of principal, and agreed that payment of the entire loan would not be accelerated even though it had already made a demand for such payment. The court concluded that these agreements in no way "modifie[d], in any sense, the fundamental terms of the subject guaranty," *id.* at 1542, and thus that defendant guarantor was not discharged from her obligations. Similarly, in *Chevron Chemical Co. v. Mecham,* 536 F. Supp. 1036 (D. Utah 1982), the creditor granted two extensions to the principal in order to give the debtor an opportunity to bring its account current. Noting that the extensions did not affect the due date on the note, the court found that they were more in the nature of "forbearances," and "did not effect a discharge of [the defendant's] independent liability based upon his guaranty." *Id.* at 1045 (footnote omitted).

So too here, the deferrals did not affect the note's maturity date, the amount of the obligation, or the rate of interest. The fundamental terms of the underlying contract, as well as those of the guaranty agreements, were not altered or modified by the deferrals. Rather, the deferrals operated as indulgences, excusing the guarantors for a given time from performing their obligations under the guaranty agreements. The defendants suggest that the extensions were highly prejudicial to their interest, permitting SRI

to increase its debt while its equipment deteriorated and the collateral securing the debt depreciated. The fact is, however, that the deferrals did not affect the maturity date of the note, and thus in no way extended the period of time for which the defendants voluntarily assumed the risks of SRI's financial insolvency. In addition, after each deferral, SRI commenced making payments again, which obviously inured to the benefit of the defendants. It is simply unreasonable to expect the SBA to call in loans at the first sign of trouble; indeed, the agency has an institutional interest in attempting to help small businesses through periods of financial difficulty. *See United States v. Gilmore,* 698 F.2d at 1197-98 (in ruling that statute of limitations began running when SBA demanded payment, and not three years earlier when creditor defaulted, court noted that agency was attempting to get the creditor "back on its feet" again); *United States v. Bachman,* 601 F. Supp. at 1541-42 (deferrals did not alter contract, but simply reflected SBA's interest in attempting to meet creditor's particular financial needs).[3] The Court therefore concludes that the deferrals granted by the Bank and the SBA did not operate to discharge defendants' liability as guarantors.

Moreover, that guaranty that defendants signed expressly provides:

> [t]he Undersigned hereby grants to Lender full power, in its uncontrolled discretion and without notice to the undersigned but subject to any provisions of any agree-

[3] Defendants cite several cases for the proposition that a guarantor's risks are increased by deferrals or extensions of time and thus discharge a guarantor's liability. None of the cases cited, however, is apposite. In *Federal Deposit Ins. Co. v. Mansion,* 712 F.2d 295 (7th Cir. 1983) and *Tomlin v. Ceres Corn.,* 507 F.2d 642 (5th Cir. 1975), for example, the extensions at issue pushed back the maturity date of the note, thereby allowing the debtor additional time in which to increase his indebtedness. In *Dynalectron Corp. v. Jack Richards Aircraft Co.,* 337 F. Supp. 659 (D. Okla. 1972), the guarantors were exonerated where collateral securing the debt was sold in a commercially unreasonable manner, and where the governing statute provided that *any* alteration of the principal obligation discharged a guarantor. Similarly, in *Rizal Commercial Bank v. Putnam,* 429 F.2d 1112 (9th Cir. 1970), a guarantor was discharged from liability by operation of a statute that provided that any extension granted to the debtor without the guarantor's consent extinguished the latter's liability.

> ment between the Debtor or any other party and Lender at the time in force, to deal in any manner with the Liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers: (a) To *modify* or otherwise change, *any terms* of all or any part of the Liabilities or rate of interest (but not to increase the principal amount of the note of the Debtor to Lender) *to grant any extension* or renewal thereof and any other indulgence with respect thereto ....

Complaint, Exhibit B (emphasis supplied). Defendants insist that the agreement contemplates only one "extension," since that term is in the singular. Such a cramped reading, however, is inconsistent with the broadly phrased waiver, and at least one court has refused to limit nearly identical language in the manner defendants suggest. In *United States v. Warwick,* 695 F.2d 1063 (7th Cir. 1982), the Seventh Circuit ruled that a guaranty agreement which provided that the SBA's "security rights shall not be impaired ... by any indulgence, including ... any renewal, extension, or modification which Holder may grant with respect to the Indebtedness or any part thereof," permitted the SBA to grant two deferrals without releasing the appellants from their obligations. *Id.* at 1070-71. While defendants invoke a series of legal maxims for the general proposition that contractual terms are to be strictly interpreted, the guaranty provision they place such great emphasis on here-specifically the terms "extension," and "renewal," which are used in the singular-is simply illustrative of the powers granted to the holder of the note. Indeed, the contract expressly states that the examples of the powers granted are not to limit that power. Given the broad sweep of the guaranty agreement's waiver provision and the powers it conferred on the SBA, the Court cannot accept defendants' contention that those powers could only be exercised once, merely because they were illustrated in the singular. Accordingly, the Court finds that even if the deferrals would otherwise have discharged defendants as a matter of guaranty law generally, the guaranty at issue here allowed the SBA to grant such deferrals without so excusing defendants from their obligations.

2. Modification

Defendants also argue that, in addition to the deferrals, the parties to the underlying contract modified the fundamental terms of that agreement several times, thereby discharging them from liability. This contention merits little discussion. To begin with, as previously noted, the guaranty agreements specifically permitted the holder of the note to modify the terms, and thus even if defendants are correct that the parties altered the note, defendants remained liable. More importantly, however, defendants simply fail to demonstrate that there were any alterations of the note other than the February 5, 1979 modification. They point to loan committee minutes, to the deposition testimony of Mr. Read, and an affidavit of Barnett, Sr., in which reference is made to an unsigned modification and extension document dated July 16, 1976. But defendants themselves concede that "it is unclear whether that document was ever signed by SRI or the Bank." Defendants' Motion for Summary Judgment at 22. Thus, defendants have proved nothing more than that the parties *considered* modifying the contract. Moreover, the February 5, 1979 modification refers to and changes the terms of the original contract, thereby indicating that no prior modification took place. On this showing, the Court can only conclude that the note was modified once—on February 5, 1979. Defendants concede that the guaranty agreements permit at least one modification of the note; accordingly, this modification in no way discharges them from their obligations.

C. Personal Jurisdiction over Defendant Barnett

Defendant Barnett, a resident of Nevada, raises the additional defense that this Court lacks personal jurisdiction over him. In his affidavit, he states that he neither conducts nor transacts any business in the District of Columbia, and was not a resident here at any time relevant to the cause of action. He does not own or lease any property here, and has only entered the jurisdiction to visit relatives. He executed the guaranty agreement in Nevada and mailed it to the District of Columbia; at no time has he come to the District of Columbia for any purpose related to the guaranty

or the underlying note. Such incidental contact with this forum, he submits, is insufficient to subject him to the jurisdiction of this Court.

In response, the government argues that Barnett's undertaking as a guarantor of a contract to be performed within the District of Columbia places him squarely within the language of the District of Columbia long-arm statute, which permits courts to exercise personal jurisdiction over a person "who acts directly or by an agent, as to a claim for relief arising from the person's ... contracting to insure or act as surety for or on any ... contract, obligation or agreement located, executed or to be performed within the District of Columbia at the time of contracting ...." D.C. Code § 13-423(a) (6). Barnett cites *Black's Law Dictionary* for the general proposition that a surety is usually bound with his principal by the same instrument and is treated as an original promisor, while a guarantor's liability is secondary and is based upon a separate contract. This distinction, he contends, renders the long-arm statute inapplicable, since it reaches only those persons who act as surety, and makes no mentionof guarantors. While neither party has directed the Court's attention to any case involving the District of Columbia long-arm statute and a contract of guaranty,the legal distinctions between a surety and a guarantor do not define the statute's reach. The statute confers jurisdiction over persons who "contract [] to insure ...any ... contract," and thus contemplates precisely the secondary liability that arises from a guaranty agreement. Accordingly, although the statute fails specifically to name contracts of guaranty, such contracts fall within its scope as a matter of substance if not nomenclature.

The government further relies on *Forsythe v. Overmyer*, 576 F.2d 779 (9th Cir. 1978), a case in which the Ninth Circuit held that a non-resident defendant was subject to the jurisdiction of the California courts by virtue of a contract in which he guaranteed an obligation negotiated in California and governed by California laws. There, as here, the defendant executed the guaranty in another state and mailed it to the forum state; the guaranty was part of the negotiations leading up to, and an inducement for, the underlying obligation; and it was to have effect in the forum state, whose laws would govern its operation. The court concluded that

this out-of-state act had a sufficient effect within the state to support jurisdiction. *Id.* at 783. While it is true that in *Overmyer* the defendant had other contacts with California, the court's finding of personal jurisdiction was predicated upon the guaranty itself, since the court had earlier concluded that the defendant's other contacts were insufficient to support the exercise of general jurisdiction over him. *Id.* at 782. Similarly, Barnett's out-of-state act has had an effect within this jurisdiction sufficient to render him amenable to suit here. Although he characterizes his guaranty as gratuitous, he executed it to benefit his son Edmund, Jr., president of SRI, and thereby to benefit himself at least indirectly. Moreover, entities within this jurisdiction relied upon that act. The Court finds, therefore, that defendant Barnett availed himself of the privilege of conducting activities in the District of Columbia and invoked the benefits and protections of its laws such that the exercise of personal jurisdiction over him does not offend traditional notions of due process.

III. Conclusion

For all the foregoing reasons, it is this 28th day of February, 1986 ORDERED that judgment is hereby entered in favor of plaintiff, United States of America, and against defendants Edmund S. Barnett, Sr. and Mark Rollinson in the amount of $99,077.20 principal, plus accrued interest of $54,633.25, plus interest accruing at the daily rate of $30.27 from October 10, 1984 up until February 28, 1986, plus interest at the legal rate from this date until paid, less any amount the United States has received in settlement from defendant Sherertz.

/s/
JOYCE HENS GREEN
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK ROLLINSON, et al.

Defendants.

CIVIL ACTION NO. 84-3397

JUDGMENT

Judgment is hereby entered in favor of the plaintiff, United States of America, and against Defendants Edmund S. Barnett, Sr. and Mark Rollinson, as set forth in the accompanying Memorandum Opinion and Order.

/s/
JOYCE HENS GREEN
United States District Judge

February 28, 1986

APPENDIX C

SBA LOAN NO.
GP-659,866,1007 DC

SMALL BUSINESS ADMINISTRATION (SBA)

GUARANTY

October 16, 1973

In order to induce District of Columbia National Bank, Washington (hereinafter called "Lender") to make a loan or loans, or renewal or extension thereof, to Sounds Reasonable, Inc., (hereinafter called the "Debtor"), the Undersigned unconditionally guarantees to Lender, its successors and assigns, the due and punctual payment when due, whether by acceleration or otherwise, in accordance with the terms thereof, of the principal of and interest on and all other sums payable, or stated to be payable, with respect to the note of the Debtor, made by the Debtor to Lender, dated _____ in the principal amount of $120,000.00, with interest at the rate of 11% per cent per annum. Such note, and the interest thereon and all other sums payable with respect thereto are hereinafter collectively called "Liabilities." As security for the performance of this guaranty the Undersigned hereby mortgages, pledges, assigns, transfers and delivers to Lender certain collateral (if any), listed in the schedule on the reserve side hereof. The term "collateral" as used herein shall mean any funds, guaranties; agreements or other property or rights or interests of any nature whatsoever, or the proceeds thereof, which may have been, are, or hereafter may be, mortgaged, pledged, assigned, transferred or delivered directly or indirectly by or on behalf of the Debtor or the Undersigned or any other party to Lender or to the holder of the aforesaid note of the Debtor, or which may have been, are, or hereafter may be held by any party as trustee or otherwise, as security, whether immediate or underlying, for the performance of this guaranty or the payment of the Liabilities or any of them or any security therefor.

The Undersigned waives any notice of the incurring by the Debtor at any time of any of the Liabilities, and waives any and all presentment, demand, protest or notice of dishonor, nonpayment, or other default with respect to any of the Liabilities and any obligation of any party at any time comprised in the collateral. The Undersigned hereby grants to Lender full power, in its uncontrolled discretion and without notice to the undersigned, but subject to the provisions of any agreement between the Debtor or any other party and Lender at the time in force, to deal in any manner with the Liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers:

(a) To modify or otherwise change any terms of all or any part of the Liabilities or the rate of interest thereon (but not to increase the principal amount of the note of the Debtor to Lender), to grant any extension or renewal thereof and any other indulgence with respect thereto, and to effect any release, compromise or settlement with respect thereto;

(b) To enter into any agreement of forbearance with respect to all or any part of the Liabilities, or with respect to all or any part of the collateral, and to change the terms of any such agreement;

(c) To forbear from calling for additional collateral to secure any of the Liabilities or to secure any obligation comprised in the collateral;

(d) To consent to the substitution, exchange, or release of all or any part of the collateral, whether or not the collateral, if any, received by Lender upon any such substitution, exchange, or release shall be of the same or of a different character or value than the collateral surrendered by Lender;

(e) In the event of the nonpayment when due, whether by acccleration or otherwise, of any of the Liabilities, or in the event of default in the performance of any obligation comprised in the collateral, to realize on the collateral or any part thereof, as a whole or in such parcels or subdivided interests as Lender may elect, at any public or private sale or sales, for cash or on credit or for future delivery, without demand, advertisement or notice of the time or place of sale or any adjournment thereof (the Undersigned hereby

waiving any such demand, advertisement and notice to the extent permitted by law), or by foreclosure or otherwise, or to forbear from realizing thereon, all as Lender in its uncontrolled discretion may deem proper, and to purchase all or any part of the collateral for its own account at any such sale or foreclosure, such powers to be exercised only to the extent permitted by law.

The obligations of the Undersigned hereunder shall not be release, discharged or in any way affected, nor shall the Undersigned have any rights or recourse against Lender, by reason of any action Lender may take or omit to take under the foregoing powers.

In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the Undersigned, immediately upon the written demand of Lender, will pay to Lender the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the Undersigned. Lender shall not be required, prior to any such demand on, or payment by, the Undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral. The Undersigned shall have no right of subrogation whatsoever with respect to the Liabilities or the collateral unless and until Lender shall have received full payment of all the Liabilities.

The obligations of the Undersigned hereunder, and the rights of Lender in the collateral, shall not be released, discharged or in any way affected, nor shall the Undersigned have any rights against Lender: by reason of the fact that any of the collateral may be in default at the time of acceptance thereof by Lender or later; nor by reason of the fact that a valid lien in any of the collateral may not be conveyed to, or created in favor of, Lender; nor by reason of the fact that any of the collateral may be subject to equities or defenses or claims in favor of others or may be invalid or defective in any way; nor by reason of the fact that any of the Liabilities may be invalid for any reason whatsoever; nor by reason of the

fact that the value of any of the collateral, or the financial condition of the Debtor or of any obligor under or guarantor of any of the collateral, may not have been correctly estimated or may have changed or may hereafter change; nor by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral, unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of Lender.

The Undersigned agrees to furnish Lender, or the holder of the aforesaid note of the Debtor, upon demand, but not more often than semiannually so long as any part of the indebtedness under such note remains unpaid, a financial statement setting forth, in reasonable detail, the assets, liabilities and net worth of the Undersigned.

The Undersigned acknowledges and understands that if the Small Business Administration (SBA) enters into, has entered into, or will enter into, Guaranty Agreement, with Lender or any other lending institution, guaranteeing a portion of Debtor's Liabilities, the Undersigned agrees that it is not coguarantor with SBA and shall have no right of contribution against SBA. The Undersigned further agrees that all liability hereunder shall continue notwithstanding payment by SBA under its Guaranty Agreement to the other lending institution.

The term "Undersigned" as used in this agreement shall mean the signer or signers of this agreement, and such signers, if more than one, shall be jointly and severally liable hereunder. The Undersigned further agrees that all liability hereunder shall continue notwithstanding the incapacity, lack of authority, death, or disability of any one or more of the Undersigned, and that any failure by Lender or its assigns to file or enforce a claim against the estate of any of the Undersigned shall not operate to release any other of the Undersigned from liability hereunder. The failure of any other person to sign this guaranty shall not release or affect the liability of any signer hereof.

/s/_____
Mark Rollinson/Ed Barnett, Sr.

Appendix D

MODIFICATION OF PROMISSORY NOTE

RE: Sounds Reasonable, Inc.
2000 (illegible) Street, N.W.
Washington, D.C. 20036
GP-65 (illegible)

WHEREAS, heretofore and under date (illegible), 1973 Sounds Reasonable, Inc. (hereinafter called "Borrower"), made, executed and (illegible) U.S. Small Business Administration, one (illegible) promissory Note, in the original principal amount of $120,000.00, payable in monthly installments of $2,055.00 each, with interest at the rate therin provided, final maturity of said Note being 10-16-80; and

Whereas, it is mutually desirable, beneficial and agreeable to the parties hereto that the repayment terms of said Note be modified as herinafter set out;

NOW THEREFORE, in consideration of the mutual benefits inuring to each other, it is understood and agreed, by and between the parties hereto, that the terms and conditions of Borrower's Note, as above described, are hereby modified as follows:

(1) That the principal portion of installments due 9/16/77 through 2/16/79 be deferred to the maturity of the Note.

(2) That the monthly installments of $2,055.00 be reduced to $1,364.00 per month effective 3/16/79.

(3) That the maturity of the note be extended from 10-16-80 to 10-16-89.

It is further understood and agreed that all other terms, conditions and covenants of the foresaid Note, not otherwise modified hereby, shall be and remain the same, and that this Agreement, when executed by the parties hereto, shall be attached to and become a part of the original Note, and shall have the same

force and effect as if the terms and conditions hereof were originally incorporated in the Note, prior to its execution.

IN WITNESS WHEREOF, This Agreement is executed by the undersigned parties as of the 5th day of February, 1979.

ATTEST: Sounds Reasonable, Inc.

By: /s/ _____

Edmund S. Barnett, Jr., President

_____

Secretary

ACCEPTED:

By: /s/ _____

Al Jones Chief,
Portfolio Management Division

The undersigned endorsers, guarantors and/or sureties on the above described Note hereby join in and consent to the above Modification Agreement.

Dated this _____ day of _____, 19 __ .

unsigned _____
Edmund S. Barnett, Sr.

unsigned _____
Gary L. Burke

/s/ _____
Edmund S. Barnett, Jr.

unsigned _____
Frances Barnett

unsigned _____
Mark Rollinson